UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

.WAIIAN PARADISE PARK CORPORATION, Hawaii corporation, Appellant,	)	
vs.	)	NO. 22394
.IENDLY BROADCASTING CO., INC., Ohio corporation, Appellee.	)	

On Appeal from the United States District Court
for the District of Hawaii

APPELLEE'S ANSWERING BRIEF

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APPELLEE'S ANSWERING BRIEF

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was based upon 28 USC §1332. jurisdiction of this Court rests on 28 USC §1291. A final judgment entered and filed in the District Court on September 19, 1967 (R-152). ice of Appeal was filed by Appellant on October 19, 1967 (R-174).

FRIENDLY'S EVIDENCE IN SUPPORT OF THE FINDINGS OF FACT DESIGNATED AS HAWAIIAN'S SPECIFICATION OF ERRORS

Hawaiian has specified certain findings of fact as error; however, as not argued all such specifications. Friendly will, therefore, nt out affirmative support for the specifications argued; namely, cification of errors 1, 4 and 7.

Specification number one contains three parts. Friendly's evidence support of the finding of fact designated as the first part, that "The

December 16, 1966 (Ex. P-6), he had express authority from Hawaiian

do so," is found in the testimony of both Mr. Becker and Mr. Watumull.

. Becker's testimony is found on pages 216 through 218, 223 through

, 232, 234 through 239, 244, 245, 249, 252 through 254 and 256 through

) of the transcript. Mr. Watumull's testimony is found on pages 277,

, 301, 326, 329, 331 through 334, 353 and 354 of the transcript.

Friendly's evidence in support of the second part of specification

nber one, "that he [Mr. Becker] had good reason to believe that he

l authority to do so [sign the letter of December 16, 1966] on behalf

Hawaiian," is as follows:

a) Exhibits D-1, P-2F, P-3 through P-6, P-9, P-12 and P-12A;

b) All of the testimony pointed out above regarding part one of specification number one.

c) Additional testimony of Mr. Becker found on pages 196 through 210 of the transcript;

d) Additional testimony of Mr. Watumull found on pages 268, 269, 271 through 273, 303 through 308, and 321 through 320 of the transcript; and

e) The evidence which supports the apparently uncontested findings of fact numbered 9, 10, 11, 14 through 23, 29, 30, 32, 37, 38 and 41 and found in the record on pages 114 through 121.

Friendly's evidence in support of the third part of specification mber one, "that Hawaiian was agreeable to the kind of agreement he r. Becker] was signing," is as follows:

a) All of the testimony pointed out above regarding part one of specification number one;

b) The additional testimony of Mr. Becker found on pages 240 through 242 of the transcript;

c) The additional testimony of Mr. Watumull found on pages 321, 322, 330, and 335 through 338 of the transcript; and

d) Exhibits P-12 and D-7.

Friendly's evidence in support of the finding of fact designated specification of error number four is as follows:

a) The testimony of Mr. Becker found on pages 196 through 218, 223 through 229, 255, and 256 of the transcript;

b) The testimony of Mr. Dobin found on pages 45 through 52, 59, 60, 62 through 64, 66 through 80, 83, 92 through 94, 104, 124 through 134 and 152 through 158 of the transcript;

c) The testimony of Mr. Watumull found on pages 268, 269, 271 through 273, 277, 286, 301, 303 through 308, 321 through 320, 329, 331 through 334, 353 and 354 of the transcript; and

d) Exhibits D-1, P-2F, P-3, P-4, P-6, P-12, and P-12A.

Friendly's evidence in support of the finding of fact designated as ecification of error number seven is as follows:

a) Exhibits P-1, and P-2A through P-2G;

b) The testimony of Mr. Courtney on pages 11, and 14 through 16 of the transcript;

c) The testimony of Mr. Dobin on pages 36 and 37 of the transcript; and

d) The testimony of Mr. Becker on pages 190 and 191 of the transcript.

QUESTIONS PRESENTED

1. Was there sufficient evidence for the District Court to hold that the time Mr. Becker signed the letter of December 16, 1966 (Ex. P-6), had express authority from Hawaiian to do so?

2. Was there sufficient evidence for the District Court to hold that . Becker had good reason to believe that he had the authority to sign December 16, 1966 letter (Ex. P-6) on behalf of his client?

3. Was there sufficient evidence for the District Court to hold that . Dobin had the right to believe that Mr. Becker had the authority to n the December 16, 1966 letter agreement (Ex. P-6).

4. Did the District Court err in denying Hawaiian's Motion for der Vacating Injunction and Dismissing Action filed on September 18, 67 (R-144)?

5. Was there sufficient evidence for the District Court to hold t station KTRG-TV (Channel 13) is one of but four commercial tele- ion stations in Honolulu and the F.C.C. certificate or license or permit operate said station is a unique chattel or asset; that the other assets chattels or property which Hawaiian contracted to sell Friendly, ile not unique unto themselves, are flavored or tainted by the F.C.C. erating permit; and that the basic agreement, as amended, is oject to specific performance?

6. Has Hawaiian, by its conduct since the final judgment entered the District Court on September 19, 1967 (R-152), waived its right an appeal?

SUMMARY OF ARGUMENT

The evidence supports the conclusion that Mr. Becker had express hority, implied authority and apparent authority to enter into the letter reement of December 16, 1966.

Hawaiian's F. C. C. operating license is a unique chattel and an reement to assign such license is specifically enforceable.

It would be unreasonable to read the December 16, 1966 letter in a nner that would allow Hawaiian to terminate the basic agreement when erything therein contemplates consummation of the transfer once F. C. C. proval is granted.

Hawaiian has waived its right of appeal by its actions since the final gment was filed herein on September 19, 1967.

ARGUMENT

I. MR. BECKER HAD THE AUTHORITY TO BIND HAWAIIAN TO HE LETTER AGREEMENT OF DECEMBER 16, 1966.

Friendly has maintained throughout these proceedings that the ter agreement of December 16, 1966 (Ex. P-6) is binding on Hawaiian. e evidence adduced at the trial supports the District Court's findings express authority, implied authority, and apparent authority on the rt of Hawaiian's Washington, D. C. attorney, Mr. Becker, to enter o and sign the December 16, 1966 letter. The letter is binding on waiian if Mr. Becker had either express, implied or apparent thority to act on behalf of his client.

EXPRESS AUTHORITY

Express authority is defined in Black, Law Dictionary (4th ed. 1957) page 691 as "Authority delegated to agent by words which expressly thorize him to do a delegable act. Authority distinctly, plainly expressed, ally or in writing. Authority which is directly granted to or conferred on agent in express terms. [Citations omitted.]" Mechum, Agency l (4th ed.) states: "Express authority requires little definition. As e name suggests, it means that it can be proved that the principal in press and explicit language made clear to the agent his willingness or sire that the act in question be done."

Whether Mr. Becker had express authority to enter into the letter reement of December 16, 1966 is a question of fact. The trier of

ct, after listening to all the witnesses and reviewing all the exhibits, s found that "At the time Mr. Becker signed the letter of December 16, 66 (Exhibit P-6), he had express authority from Defendant to do so." here is much testimony supporting this finding of fact and the transcript ferences have been listed above in Friendly's designation of evidence support of the finding of fact listed by Hawaiian as part one of speci- cation of error number one.

In addition to the direct evidence on express authority, there was idence that showed Hawaiian was aware of and accepted the benefits the December 16, 1966 letter and from which the trial judge could asonably infer Hawaiian's knowledge of the agreement. For example:

1. Hawaiian's attorney was present at all of the F. C. C. hearings (T-87) which Hawaiian knew could not be completed and a decision rendered before February 3, 1967 (T-245);

2. Two of Hawaiian's employees, Mr. Lindemann and Mr. Tateishi, went to Washington, D. C. and testified before the hearing examiner (T-86, 8 of 356 and 357);

3. Even after the termination date of February 3, 1967 set forth in the basic agreement, Hawaiian partici- pated in the preparation and filing of proposed findings of fact and conclusions of law and replys to the Broadcast Bureau's proposed findings of fact and conclusions of law (T-89 through 91);

4. Hawaiian did not send its termination letter until approximately ten weeks after February 3, 1967 (Ex. P-10);

5. Hawaiian's home office had knowledge of the status of the F. C. C. proceedings (Ex. 11A - F; T-355);

6. Hawaiian did not attempt to terminate the agreement with Friendly until it had reached an agreement on the purchase price of $660,000 for the television station with Bishop Industries, $110,000 more than the contracted price with Friendly (T-321 and 342); and

7. Hawaiian has made no attempt to return to Friendly the $5,000 attorney's fees paid to Mr. Becker pursuant to the December 16, 1966 letter agreement (T-337).

IMPLIED AUTHORITY

Implied authority is defined in Black, Law Dictionary (4th ed. 1957) page 169 as "Actual authority circumstantially proved. That which the incipal intends his agent to possess, and which is implied from the incipal's conduct. It includes only such acts as are incident and cessary to the exercise of the authority expressly granted. [Citations nitted.]"

In Moore v. Switzer, 78 Colo. 63, 239 P. 874, it is stated at ge 65 as follows:

> . . . Implied authority of an agent is actual authority evidenced by conduct, that is, the conduct of the principal has been such as to justify the jury in finding that the agent had actual authority to do what he did. This may be proved by evidence of acquiescence with knowledge of the agent's

acts, and such knowledge and acquiescence may be shown by evidence of the agent's course of dealing for so long a time that knowledge and acquiescence may be presumed. . . .

Mechum, Agency §54 (3) (4th ed.) states that the most common stance of this type of authority is found in cases where the agent has peatedly exercised some power not expressly given him and the incipal, with knowledge of the same, has, by making no objection, citly sanctioned the continuation of the practice. There is no doubt at the practice indulged by Hawaiian and its Washington, D. C. attorney s neatly into this statement of the law.

The trial judge has found that Mr. Becker had good reason to lieve he had the authority to sign the letter of December 16, 1966 on half of Hawaiian. The trial judge had every right to make this finding sed upon the past actions of Hawaiian (Ex. P-2G, P-3, P-4, and P-12A), d the procedure established by Hawaiian allowing Mr. Becker to negotiate its behalf (T-326 and 329). Additional evidence in this regard is set rth above in Friendly's designation of evidence in support of the finding fact listed by Hawaiian as part two of specification of error number one.

APPARENT AUTHORITY

The basis for apparent authority has been well stated in 3 Am. Jur. 2d, ency, §73 at pages 475 and 476 as follows:

> The liability of the principal for the acts and contracts of his agent is not limited to such acts and contracts of the agent

as are expressly authorized, necessarily implied from express authority, or otherwise actually conferred by implication from the acts and conduct of the principal. So far as concerns a third person dealing with an agent, the agent's 'scope of authority' includes not only the actual authorization conferred upon the agent by the principal, but also that which has apparently been delegated to him. Apparent authority, or ostensible authority, as it is also called, is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds himself out as possessing. In effect, therefore, an agent's apparent authority is, as to third persons dealing in good faith with the subject of his agency and entitled to rely upon such appearance, his real authority, and it may apply to a single transaction, or to a series of transactions. [Emphasis supplied.]

And in §74 at page 476 and 477, it is stated, in part, as follows:

. . . The apparent authority of an agent results from statements, conduct, lack of ordinary care, or other manifestations of the principal's consent, whereby third persons are justified in believing that the agent is acting within his authority . . ..

Apparent authority may be, and often is, derived from a course of dealing or from the fact that a number of acts similar to the one in question were assented to, ratified, or not disavowed by the principal. The acquiescence of the principal in an extension of his authority by an agent in the transaction in question may be

sufficient to create the appearance of authority in the agent to do such act; the acquiescence in, and the consequent scope of, such authority, is to be determined not only by what the principal actually does know of the acts of the agent within the employment, but also as to what he should, in the exercise of ordinary care and prudence, know the agent is doing in the agency transaction. In such case, the appearance of authority is created because of the fact that the third person is entitled to assume that the principal is cognizant of the exercise of authority and would forbid it if it were unauthorized.

Stated inclusively, then, the rule is that if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of theagent's act or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, such principal is bound by the acts of the agent within the scope of his apparent authority as to any person who, upon the faith of such holding out, believes, and has reasonable ground to believe, that the agent has such authority, and in good faith deals with him [Emphasis supplied.]

In T. G. Bush Grocery Co. v. Conely, 61 Fla. 131, 55 So. 867, aintiff was a wholesale grocer and Defendant was a retail dealer. Parker as a traveling salesman for Plaintiff whose authority was to sell goods at ices as instructed by Plaintiff. Plaintiff admitted that while Parker d no specific authority to collect money for goods sold, yet he did llect and Plaintiff did not object to it and that Plaintiff recognized his

thority to collect money by not objecting to the practice.

Parker was not authorized to give rebates on the bills for ods sold and Plaintiff had no knowledge that he was allowing rebates Defendant. Plaintiff sued to get rebates which Parker had allowed efendant. The Court stated at page 135:

> Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. [Citation omitted.] Whether or not an act is within the scope of an agent's apparent authority is to be determined, under the foregoing rule, as a question of fact, from all circumstances of the transaction and the business. Where one of two persons must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. [Citations omitted.]
>
> If one holds another out to the world and accredits him as his agent, he is bound by that person's acts done within the scope of the agency thus given to him. In such cases the question is, not what authority was intended to be given to the agent, but what authority was the third person dealing

with him justified from the acts of the principal in believing was given to him. [Citations omitted.]

In the case now before this Court, Plaintiff's witnesses testified at after Mr. Becker communicated Defendant's rejection of the ovember supplement to agreement to Mr. Dobin, a new arrangement s agreed upon, communicated to and accepted by Mr. Watumull, and r. Watumull's acceptance communicated to Mr. Dobin (T-224 through 8). In International Union of Op. Eng., Local 406 v. Guy Scroggins, c., (Ct. of Appeals La.) 168 So. 2d 724, the union sought an injunction prevent violation of terms of a contract between the union and Defendant. idence showed the union asked the construction superintendent on the to sign a collective bargaining agreement which he refused to do. He id he would talk about the contract with the corporate president and ajor stockholder. After talking to the corporate president and major ockholder, he signed the contract. The Court held that after talking th the corporate president and major stockholder he had apparent thority to sign the contract and that the employer was estopped to deny s agency or his authority to so sign. The Court also found that the perintendent had no actual authority but he did possess apparent thority.

An agent's course of conduct, apparently acquiesed in by his nployer, was sufficient to show apparent authority in Shaw v. Bailey, t. of Appeals Ala.) 55 So. 2d 132, which was an action in detinue to cover a car sold to Defendants by Miles, an employee of Plaintiff

no worked in Plaintiff's body shop, but not as a salesman at Plaintiff's ed car lot. It was conceded Miles had no express authority to sell rs.

Right after being fired by Plaintiff, Miles went to Plaintiff's used r lot and took a car, saying that he was taking it to the shop for repairs. iles took the car to Defendants and sold it for $275, $5 cash and a check r $270 made payable to Miles as representative of Plaintiff. Miles gave efendants a bill of sale executed before a notary public and signed Hubert A. Miles, Rep. Kelly Shaw Motor Co."

During the trial Defendants showed that Miles had printed cards owing he was a salesman for Plaintiff; that Defendants had previously ught a car from Miles as a salesman for S&S Motor Co., of which aintiff was a partner; and that Miles had sold or attempted to sell rs from Plaintiff's company to others. It was held that Defendants owed that Miles had apparent authority to sell the subject car and at Plaintiff was estopped to deny such authority.

In a case in which Plaintiff sought to recover from Defendant oney loaned to its agent on his representation that the Defendant would ld the money and pay interest until enough was accumulated to buy an nuity, Mattice v. Equitable Life Assur. Soc., 170 Wis. 504, 71 N. W. 262, the Court found that the agent, who used the money for his own nefit, had no actual authority to borrow the money and had not pre- ously borrowed money on Defendant's name. After stating that parent authority must be traced to the principal, the Court said that

ree elements are necessary to establish apparent authority: "(1) Acts
ne by the agent or principal justifying belief in the agency. (2) Knowledge
the party thereof sought to be held (in the present case, appellant).
) Reliance thereon by the plaintiff, consistent with ordinary care and
udence." The Wisconsin Supreme Court also stated that the rule that a
rson dealing with an agent known to be acting for a principal must at
s peril ascertain the extent of the agent's authority must be read in
nnection with the rule that if a third person, because of appearances
r which the principal was responsible, believes and has reasonable
ound to believe that the agent possessed power to act for the principal
the particular transaction, if such third person was, in the exercise
reasonable prudence, justified in believing that the agent possessed
e necessary authority, then the principal is responsible to third person
e same as if the agent possessed all the power he assumed to possess.

During the course of the trial, it was brought out that because
the distance separating the parties and F. C. C. rules, it was necessary
r the parties to be represented by counsel. Also, both parties are
rporations and must, therefore, act through their agents. In Brace v.
orthern Pacific R. Co., 63 Wash. 417, 115 P. 841, the Court said that
corporation, because of its very nature, must necessarily act through
s agents; that persons are justified in relying upon the apparent authority
such conceded agents; and that a corporation, being required to appoint
agent having such apparent authority as to be able to mislead persons
aling with them, should be required to secure an agent who will not

ct in excess of his actual authority.

Another case along the same vein, General Motors Truck Co. s. Texas Supply Co., 64 F. 2d 527, in which Defendant's regional manager greed to buy back defective trucks sold to Plaintiff by an independent ealer, the Court held that the act of an agent within the apparent scope f his authority, though not within the scope of his real authority, is inding on the principal where a loss would otherwise result to one who in good faith relied on such apparent authority. The Court also aid that an act was within the apparent scope of an agent's authority when a reasonably prudent person, having knowledge of the usages of he business, would be justified in supposing that the agent was uthorized to perform the act from the character of his known duties.

Without doubt, the evidence in the case now before this Court, s brought out in the examinations of Mr. Dobin and Mr. Becker, nd even Mr. Watumull himself, clearly shows that the Defendant had lothed Mr. Becker with an abundance of apparent authority.

II. SPECIFIC PERFORMANCE OF A CONTRACT TO SELL A UNIQUE CHATTEL.

The basic agreement (Ex. P-1) provided for a purchase price of 550,000 for all of the fixed and tangible assets of KTRG-TV (Channel 13) ncluding the F. C. C. operating license or permit. Mr. Courtney esti- nated the fixed assets to be worth $250,000 (T-11). This leaves a alue of $300,000 to be applied to the operating license. While the price

alloted to a chattel does not make it unique, it does indicate the value of the chattel in the eyes of the seller and buyer. Insofar as the KTRG-TV operating license is concerned, the price placed on it shows that the value of the operating license exceeds by $50,000 the value of all the other fixed assets of the station and, while not controlling, is indicative of the uniqueness of the operating license.

It is well established that equity will decree the delivery of specific unique chattels. See 81 C.J.S., Specific Performance, §67. It has been held in many jurisdictions that a contract to sell, transfer, or assign a liquor license is specifically enforceable. Ibid. It has also been held that contracts to assign Interstate Commerce Commission certificates of convenience and necessity are specifically enforceable, at least to the extent of compelling the parties to the agreement to take the steps necessary to effectuate such assignment. See 15 ALR 2d 893 where it is stated, in part, as follows:

> It appears that the fact that a transfer of a certificate of convenience and necessity generally requires the approval of the commission issuing such certificate does not preclude a court from decreeing specific performance of an agreement to transfer such a certificate at least to the extent of compelling the parties to the agreement to take the steps necessary to effectuate such transfer, such as applying to the commission for an approval of the transfer and furnishing any information or papers necessary on such application.

See also Watson Bros. Transp. Co. v. Jaffa (CA 8th Iowa) 143 F2d 340; Lennon v. Habit, 216 N.C. 141, 4 S.E. 2d 339; and Royal Coach Lines, Inc., 140 N.J. Eq. 19, 52 A. 2d 763, app. dismd 2 N.J. 3, 65 A. 2d 264.

The scarcity of a chattel is, of course, an important factor recognized by courts of equity in determining whether specific performance of a contract for its sale will be granted. Even Defendant concedes that there are only four commercial television stations in Honolulu. Furthermore, it is uncontroverted that under the present F.C.C. allotment of channels no new channels can be acquired (T-11, 14 through 16, 36, 37, 190 and 191).

Plaintiff concedes that the fixed chattels of Defendants television station are not unique chattels and would not be subject to specific performance but for the F.C.C. operating license which is not only one of but four such operating licenses allotted to Honolulu but which cannot be duplicated at this time by the grant of an additional operating license by the F.C.C.

III. THE TRIAL COURT DID NOT ERR IN APPLYING THE LETTER AGREEMENT OF DECEMBER 16, 1966.

On September 15, 1967, counsel for Hawaiian made an oral motion to vacate the preliminary injunction and to dismiss the action (T-408). On September 18, 1967, Hawaiian filed a written motion asking for the same relief, together with a statement of reasons in support of the

notion. The Trial Court spoke at length on the reasons denying Hawaiian's motion (T-422 through 437, 440 and 441) and those reasons are incorporated herein by reference.

At one point (T-422), the Trial Court stated: "That December 16 letter must be read in connection with the entire record that is available, and that is proper to be constituted with it."

Hawaiian's counsel replied: "I concur, your Honor."

Obviously, if the December 16, 1966 letter is read with the basic agreement (Ex. P-6) and the letter agreement of January 11, 1966 changing the closing date (Ex. P-2G), the parties contemplated a closing of the deal within five days after final F. C. C. approval and further intended and did bind each to the other to perform as stated in the basic agreement as amended. Any other interpretation renders the December 16, 1966 letter void and negates all of the efforts by Hawaiian and Friendly to get F. C. C. approval of the assignment of the operating license. Surely neither party ever intended terminating the sales agreement after F. C. C. approval, and to allow Hawaiian to terminate after F. C. C. approval would result in a manifest injustice.

IV. HAWAIIAN HAS WAIVED ITS RIGHT TO BE HEARD ON APPEAL.

On January 8, 1968, Friendly filed a motion herein seeking to dismiss this appeal. The motion was accompanied by points and authorities in support of the motion as well as by affidavits and exhibits. On February 8, 1968, an order was issued herein denying the motion but

allowing Friendly to renew the motion when this cause is submitted on the merits.

Friendly hereby resubmits its said motion and incorporates herein by reference said motion with all of its supporting memorandum, affidavits and exhibits.

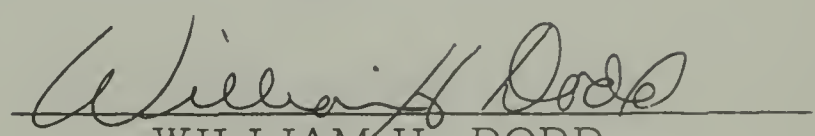
CONCLUSION

Based upon the reasons and authorities stated above and the record herein, it is respectively submitted that the Trial Court committed no error prejudicial to Hawaiian, made proper findings of fact in respect to the letter agreement of December 16, 1966 and properly concluded that the said letter agreement was binding on Hawaiian and that the basic agreement as amended was specifically enforceable.

It is further submitted that the judgment of the District Court should be affirmed and Appellee should have its costs incurred herein.

Dated at Honolulu, Hawaii, this 13th day of August, 1968.

Respectfully submitted,



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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have amined Rules 18, 19 and 39 of the United States Court of Appeals for the ith Circuit, and that, in my opinion, the foregoing brief is in full com- ance with those rules.

William H. Dodd

WILLIAM H. DODD